9-24-2014

James v. City of Boise Respondent's Brief Dckt. 42053

IN THE SUPREME COURT OF THE STATE OF IDAHO

MELENE JAMES

Plaintiff-Appellant,

v.

CITY OF BOISE CITY, a political subdivision of the State of Idaho; STEVEN BONAS, STEVEN BUTLER, TIM KUKLA,

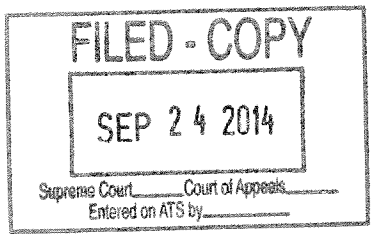
Defendants-Respondents

RODNEY LIKES, AND DOES I-X, unknown parties,

Defendants.

Case No. 42053

RESPONDENT'S BRIEF



APPEAL FROM THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

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COMES NOW, the Respondent by and through Kelley K. Fleming, Assistant City Attorney, and hereby files its Respondent's Brief in the above-captioned matter.

STATEMENT OF THE CASE

On the evening of Sunday, December 26, 2010, the sound of shattering glass from a dental office across the street drew the attention of Jarod Hendryx ("Hendryx"). (R. 000825, Ex. 1.) He left the residence he was at, crossed the street to investigate, and found a female climbing through a broken basement window of a dental center. *Id.* When he first saw her, she was halfway through the broken basement window. *Id.* He asked her if she was okay and she responded by "looking at him kind of crazy" and stating she was trying to get her keys. *Id.* In his subsequent call to 911, Hendryx reported the woman seemed to be "under the influence of either drugs or major alcohol," "really lethargic" and "totally out of it." *Id.* It was later determined that the woman crawling through the basement window was Plaintiff Melene James ("James") and that she really was extremely intoxicated. A hospital laboratory report showed her alcohol level to be .27 and she also tested positive for cannabinoids. (R. 000196.)

When Hendryx called 911 he reported a "breaking and entering" at the dental center. (R. 000825, Ex. 1.) Officers from the Boise Police Department ("BPD") were dispatched to the location for a "burglary in progress" and were provided the information reported by Hendryx. (R. 000245, Ls. 8-17.) Defendant Officer Steven Butler ("Officer Butler") was the first officer on scene, arriving at approximately 5:30 p.m., followed by Officer Barber. (R. 000203, Ls. 12-14.)

When Officer Butler arrived, he spoke with Hendryx about what he had witnessed. (R. 000205 Ls. 1-9; R. 000206, Ls. 1-25.) Officer Butler then personally observed the broken window and relayed that information to other officers responding to the scene. (R. 000207, Ls. 14 through R. 000208, L. 1.) Through a different basement window, Officer Butler observed a

woman in the building. (R. 000209, Ls. 1-11.) He observed that this woman was holding a knife and drinking from a beer can. (R. 000210, Ls. 9-14.) Specifically, she had a Steele Reserve 211, which is a type of malt beverage. (R. 000211, Ls. 13-25; R. 000212, Ls. 1-19.) The knife she was holding in her other hand had a blade of approximately four or five inches. (R. 000213, Ls. 3-21.) As Officer Butler watched, he noted that the woman was rummaging through items on a table. (R. 000214, Ls. 4-16; R. 000215, Ls. 5-9.) He observed these things for a brief period of time before the woman, later identified as James, moved away from the window and out of view. (R. 000216, Ls. 2-9.) He then provided the information he had obtained to other responding officers. (R. 000217, Ls. 6-10.)

When Officer Barber arrived on scene, he spoke to a cleaning lady and obtained a key to the building. (R. 000231, Ls. 14-21; R. 000234, Ls. 2-8.) He also made contact with building co-owner Dr. Carrick Brewster. (R. 000229, L. 25 through R. 000230, L. 2.) Dr. Brewster was on scene and advising officers that no one should be in his building, especially if the person had to gain entry by breaking out a window. (R. 000235, Ls. 1-18.)

At approximately 6:00 p.m., Defendant Officer Steven Bonas ("Officer Bonas") received a request for a patrol K-9 to the burglary in progress call at the dental center. (R. 000248, Ls. 4-19.) Officer Bonas, a member of BPD's canine unit, responded with his police dog Ruwa and was briefed by officers already on scene. (R. 000244, Ls. 19-22; R. 000249, Ls.15-23.) In particular, he learned that both the building owner and the cleaning person had advised officers that nobody should be in the building and that the person in the building had been seen with a knife. (R. 000252, Ls. 9-25; R. 000256, Ls. 15-18; R. 000257, Ls. 3-17.) He also personally

observed the broken window[1] and noted that the majority of the building was dark. (R. 000254, Ls. 1-8; R. 000255, Ls. 8-13.) At this time, Officer Bonas was aware that there had been several recent burglaries of local dental offices. (R. 000263, Ls. 9-23.) He was also aware that dental offices contain many nontraditional weapons. (R. 000264, Ls. 9-15.) He considered that, since the majority of the unfamiliar building was dark, the suspect would have the tactical advantage (i.e. cover and concealment) and could easily be lying in wait. (R. 000265, Ls. 3-8; R. 000276, Ls. 24-25.)

As the canine handler, Officer Bonas needed to determine whether the situation justified canine use and appropriate tactical measures to be taken. (R. 000344-345, para. 8; R. 000347 through 000358.) The decision regarding Ruwa's deployment was made based upon the above-described factual information in conjunction with the following factors from the BPD policies and Procedures Manual and SOP#P3.0001.0:

- The severity of the crime;
- Whether the suspect posed an immediate threat to the safety of officers and others;
- Whether the suspect was actively resisting arrest or attempting to evade arrest at the time; and
- Whether deployment of the canine presented a danger to the safety of uninvolved citizens and other officers.

Officer Bonas ultimately determined the use of a police dog was both reasonable and necessary, as well as the safest manner to search for the suspect and, hopefully, gain a peaceful surrender. (R. 000258, Ls. 15-16; R. 000290, Ls. 1-8; R. 000344-345, at para. 8 & 9.) Several

[1] Shattered glass from the broken window still littered the floor when officers were clearing the basement, indicating James had not made any attempt to clean it up despite the length of time that had passed since James' entry through the window. (R. 000265, Ls. 21 through R. 000266, L. 4.)

commands to exit the building prior to exposure to the canine were provided to James but she refused all of them. (R. 000268, Ls. 24-25.) The first command was given prior to officers' entry into the building. Officer Butler used the PA system in a patrol car to give a canine announcement. (R. 000247, Ls. 2-18.) Through such announcements, police identify themselves to the suspect, identify why they are there, give instructions on what they want the suspect to do and advise the suspect that if he does not surrender then a police dog will be used to find him and they may be bit. (R. 000259, Ls. 7-15; R. 000260, Ls. 2 through R. 000261, L. 9.)

Subsequent to the PA announcement, Officer Bonas made announcements at the front door after opening it with a key but before making entry. (R. 000271, Ls. 11-20.) After the announcement was given Ruwa began barking loudly. (R. 000825, Ex. 2.) No response was received so officers entered the building with Ruwa to search for the suspect. (R. 000271, Ls. 11-20.) Midway through the search of the top floor, Officer Bonas downed Ruwa and provided another announcement. (R. 000272, Ls. 10-16.) Ruwa again barked loudly. (R. 000825, Ex. 2.) Despite the commands, followed by the dog's loud barking within the building, still no one surrendered. *Id.*

Once the top floor of the business had been searched, the police officers staged at the top of the stairs leading to the basement. (R. 000273, Ls. 6-8.) Officer Bonas yelled another K-9 announcement down the narrow stairway which was again followed by Ruwa barking. (R. 000273, Ls. 6-14; R. 000825, Ex. 2; R. 000299, Ls. 6-13.) Again, no one called out to surrender or even make their presence known. *Id.* At this point, officers were facing a blind corner at the bottom of the staircase with no idea whether someone was down in the dark, unfamiliar basement lying in wait. (R. 000278, Ls. 1-3.) Officer Bonas gave Ruwa the command to search and Ruwa proceeded down the stairs to do so. (R. 000275, Ls. 4-9.)

A short time later, Officer Bonas heard Ruwa go into a bark alert. (R. 000275, Ls. 14-22.) This indicated to him that Ruwa had located the source of the odor of a suspect(s) but had yet to actually find the person. (R. 000276, Ls. 6-23.) Officer Bonas gave Ruwa the bite command to encourage Ruwa to locate the source of the human odor. (R. 000277, Ls. 4-10.) After a pause, Officer Bonas heard screaming and realized that Ruwa was on the bite. (R. 000277, Ls. 4-12; R. 000179, Ls. 5-10; R. 000195, R. 000825, Ex. 2.) He issued a command for the suspect to call out or surrender to no avail. (R. 000279, Ls. 11-16.)

The officers went down the stairs to the bathroom where Officer Bonas reports seeing through the door opening the suspect's torso and Ruwa in the bathroom. (R. 000279, L. 17 through R. 000280, L. 12.) Then the bathroom door closed. (R. 000280, Ls. 13-15.) One of the officers pushed the door open. (R. 000282, L. 22 through R. 000283, L. 6.) At this point Officer Bonas saw Ruwa biting the suspect's right arm. (R. 000284, Ls. 5-7.) Once officers were able to clear James' hands, Officer Bonas gave Ruwa commands to release and lay down; Ruwa immediately obeyed. (R. 000284, L. 8 through R. 000285, L. 10; R. 000286, Ls. 3-5; R. 000287, Ls. 7-12; R. 000825, Ex. 2.) The entire duration of the bite was a matter of seconds, well under a minute. (R. 000288, Ls. 9-12; R. 000310, Ls. 19-24; R. 000311, Ls. 18-20; R. 000825, Ex. 2.)

The arrest team then handcuffed James, and she was escorted out of the building to receive immediate medical attention from Ada County Paramedics who were already on scene. (R. 000237, Ls. 18-22; R. 000238, Ls. 6-17; R. 000232, Ls. 14-20; R. 000304, Ls. 1-3.) Dr. Brewster advised officers he wanted to press charges against James for the damage she caused to his building. (R. 000302, L. 11 through R. 000303, L. 14.)

James does not have a memory of her encounter with Ruwa. (R. 000321, Ls. 19-23.) After entering the lab through the window she broke, she remembers only finishing up some

work, drinking a Steele Reserve of unknown ownership in an effort to help her calm down, and then going into the bathroom.[2] (R. 000317; R. 000318, Ls. 11-24, and R. 000320.) Thus, the majority of the above events are documented through the accounts of the officers on scene and police audio recordings.

ATTORNEY FEES ON APPEAL

Respondents seek an award of attorney fees and costs pursuant to 42 U.S.C. § 1988, and Idaho Code §§ 12-117 and 12-121. The standard for an award of attorney fees under these statutory provisions is similar.

A. Attorney Fees Under 42 U.S.C. § 1988

In order to be awarded attorney fees pursuant to 42 U.S.C. § 1988, a court must determine whether a party is in fact a prevailing party. *Santiago v. Municipality of Adjuntas*, 741 F.Supp.2d 364, 369 (2010). A prevailing party has been defined as one who has been awarded some relief by the court. *Buckhannon Bd. And Care Home, Inc. v. West Virginia Dept. of Health and Human Resources,* 532 U.S. 598, 603, 121 S. Ct. 1835, 1839 (2001). There is no question that Respondents are the prevailing party in this action.

In addition to being the prevailing party, a defendant must establish that the plaintiff's suit was "totally unfounded, frivolous, or otherwise unreasonable or that the plaintiff continued to litigate after it clearly became so". *Santiago*, 741 F.Supp.2d at 370. A court will determine whether frivolity exists by considering (1) whether the plaintiff established a prima facie case; (2) whether the defendant offered to settle; (3) and whether the trial court dismissed the case prior to trial or held a full-blown trial on the merits. Cases sustaining the frivolity standard include decisions on summary judgment in a defendant's favor where plaintiffs did not offer evidence to support their claims. *Id.*

[2] Oddly enough, there was no light on in the bathroom and the room was pitchblack. (R. 000287, Ls. 7-12.)

As to the instant case, the District Court granted summary judgment on the merits in favor of Respondents and dismissed the action in its entirety. (R. pp. 000732 through 000779.) The Appellant was unable to establish a *prima facie* case against Respondents sufficient to support the conclusion that Respondents impermissibly used excessive force in the arrest and seizure of Appellant. *Id.* Under 42 U.S.C. § 1988, then, Respondents are entitled to an award of reasonable attorney fees.

B. Attorney Fees Under Idaho Code § 12-117

Idaho Code § 12-117 provides for the mandatory award of attorney fees to the prevailing party in administrative or civil judicial proceedings with a city. Idaho Trial Handbook § 36:11 (2d ed. 2013); *City of Osborn v. Randel*, 152 Idaho 906, 909, 277 P.3d 353, 356 (2012). The award of attorney fees can arise if the case is brought, pursued or defended frivolously, unreasonably, or without foundation. *Nation v. Dept. of Correction,* 144 Idaho 177, 194, 158 P.3d 953, 970 (2006); *Marcia T. Turner, L.L.C. v. City of Twin Falls*, 144 Idaho 203, 212, 159 P.3d 840, 849 (2007). As argued later in this brief, Appellant's claims are without foundation as Appellant failed to introduce any significant probative evidence supporting her complaint.

C. Attorney Fees Under Idaho Code § 12-121

Attorney fees can be awarded on appeal pursuant to Idaho Code § 12-121 if the appellant simply invites the appellate court to second-guess the District Court on conflicting evidence. Here Appellant was dissatisfied with the lower court's factual findings and determination and has done "little more than invite this Court to second-guess those findings." *Doe v. Doe*, 149 Idaho 669, 675, 239 P.3d 774, 780 (2010); *Downey v. Vavold*, 144 Idaho 592, 596, 166 P.3d 382, 386 (2007). Respondents are therefore entitled to an award of reasonable attorney fees under this statute.

Under the above statutory provisions, Respondents respectfully request an award of attorney fees and costs on this appeal.

ARGUMENT

A. The District Court Properly Determined That the Operative Facts were Undisputed and Did Not Fail to Review the Record in a Light Most Favorable to the Appellant.

James' argument that this case presents numerous disputed facts is meritless. While it is well-established that the court must view the evidence in the light most favorable to the nonmoving party, drawing all reasonable inferences in her favor, it is equally well-established that a party is entitled to summary judgment when the record shows that there is no **genuine** issue as to any **material** fact. *See Scott v. Harris,* 550 U.S. 372, 380, 127 S. Ct. 1769, 1776 (2007)(facts must be viewed in the light most favorable to the nonmoving party only if there is a genuine dispute as to those facts). "Material facts are those which may affect the outcome of the case." *Long v. County of Los Angeles,* 442 F.3d 1178, 1185 (9th Cir. 2006). The facts material to this case are not genuinely in dispute.

The "numerous" facts James alleges are in dispute are simply not material to a proper excessive force analysis. For example, a determination as to whether Hendryx actually saw James break the basement window or just heard it breaking and then saw her climbing through it would not affect the outcome of the force analysis. It is undisputed that, in her intoxicated state, she broke the basement window thereby gaining entry to the building. That fact, in conjunction with the statement by the building owner that no one should be in the building, supports the burglary in progress characterization of Hendryx' 911 call. Likewise, whether the PA announcement warning was made from Officer Butler's patrol car or Officer Barber's patrol car and James' questioning of the timing of warnings issued by police would not affect the outcome

as (1) officer audio recordings establish that police gave several loud yet unheeded warnings; and (2) James has no recollection of warnings such that she cannot credibly dispute them even if they were not captured on audio. *Scott v. Harris, supra,* 550 U.S. at 380, 127 S. Ct. 1776 ("When opposing parties tell two different stories, one of which is blatantly contradicted by the record, so that no reasonable jury could believe it, a court should not adopt that version of the facts for purposes of ruling on a motion for summary judgment.").

James' argument consists of a desperate attempt to create factual disputes that either do not exist (e.g., Respondents never argued that Jared Hendryx saw James break the window) or do not matter (e.g. which patrol car the PA announcement was issued from). The material facts are not genuinely in dispute. The District Court properly recognized this when, first noting the unique nature of this case, it stated "[u]nlike most excessive force claims where the parties' accounts of the events markedly diverge, the operative facts here are undisputed." (R. 000745.) That is not an erroneous characterization of this case. The availability of audio recordings, James' lack of recollection of key events and the lack of dispute over statements from Mr. Hendryx and building owner Dr. Brewster markedly distinguish this case from those that require a jury to sift through disputed factual contentions.

The District Court thoroughly analyzed the operative facts and applicable law in arriving at its decision to grant summary judgment for Respondents. James cannot sufficiently support her assertion that the Court erred in concluding the operative facts were undisputed. To defeat a properly supported motion for summary judgment the nonmoving party must introduce some significant probative evidence tending to support the complaint. *Fazio v. City & County of San Francisco,* 125 F.3d 1328, 1331 (9th Cir. 1997) quoting *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 249, 252, 106 S. Ct. 2505 (1986). A showing of some "metaphysical doubt" to the

material facts or providing "conclusory, speculative testimony" will not raise a genuine issue of fact to defeat summary judgment. *Matsushita Elec Indus Co v. Zenith Radio Corp,* 475 U.S. 574, 586, 106 S. Ct. 1348 (1986); *Soremekun v. Thrifty Payless, Inc.,* 509 F.3d 978, 984 (9th Cir. 2007). The absence of a genuine issue of material fact in this case means that only a question of law remains. *Miller v. Idaho State Patrol*, 150 Idaho 856, 863 (2011).

B. The District Court Properly Determined that the Level of Intrusion on James' Constitutional Rights was Serious or Significant, not Moderate or Severe.

James alleges that the nature and quality of the intrusion on her Fourth Amendment interests was severe. She supports this allegation by reference to her medical records for a description of the injuries she sustained. The District Court recognized that "[w]ithout question, James sustained significant and lasting injuries." (R. 000746.) However, unlike James, the court also took into account the duration of the bite. The audio recording, officer testimony, and James' lack of recall led to the indisputable conclusion that the bite lasted no more than 36 seconds. The court correctly compared both the bite duration and the injuries sustained to other court decisions that have evaluated the quantum of force in dog bite cases.

The District Court found the present factual scenario analogous to that in *Miller v. Clark County*, 340 F.3d 959, 964 (9th Cir. 2003). In *Miller*, the court determined that the intrusion (a 45-60 second bite that caused severe injury) was serious or significant, not moderate or severe. James takes issue with the court's reliance upon *Miller*. Yet, the Ninth Circuit case analyzed below that found a severe intrusion from a dog bite, *Chew v. Gates*, is easily distinguishable from the present case in both bite and injury severity (multiple bites, dragging plaintiff up to ten feet and nearly severing plaintiff's arm). 27 F.3d 1432, 1441 (9th Cir. 1994). Thus, while the

court is required to view the factual record in a light most favorable to the plaintiff, it is not required to ignore undisputed facts and applicable law favorable to Respondents. In this case both the material facts and the applicable law support the District Court's conclusion that the intrusion was serious or significant.

C. *Graham v. Connor* Does Not Require the Court to Review the Record in a Light Most Favorable to Plaintiff Before Applying Various Factors.

James argues that the District Court was obligated to view the facts in a light most favorable to her BEFORE it applied the *Graham* analysis. (Appellant's Br., p. 26.) This is a puzzling assertion to the extent it begs the question: how can you view facts favorable to a plaintiff without the legal framework to know what makes a fact favorable? James states that by concluding the facts were undisputed the District Court failed to consider how certain factual disputes, if viewed in her favor, would affect the analysis of these various factors. (Appellant's Br., p. 26.) This seems to be taking issue with the lower court's legal (not factual) analysis.

A fact is either disputed or not regardless of the applicable analysis; the legal analysis tells us what facts are material - which is important because some facts do not matter regardless of whether they are disputed. This argument appears to be nothing more than a nonsensical attempt to circumvent the well-established tenant of the *Graham* analysis that "[t]he 'reasonableness' of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." *Graham v. Conner,* 490 U.S. 386, 396, 109 S. Ct. 1865, 1872 (1989).

D. Whether the District Court Erred by Finding that the Officers Had No Reason to Question Whether a Burglary was Committed.

James avers there were numerous facts which should have caused the police to question whether a burglary was actually occurring. She claims that the District Court improperly concluded that the officers reasonably believed she was engaged in a burglary (Appellant's Br., p. 27.) Characterization of the crime in question as a burglary is supported by the undisputed facts that on the Sunday night after Christmas, James broke a window to a closed dental building, crawled through it into the basement, and was seen by an officer drinking and rummaging through instruments. The 911 caller reported a breaking and entering by an intoxicated woman, responding officers observed the broken window and were definitively advised by the building owner that no one was supposed to be inside. This was occurring in an area that had recently experienced thefts from other dental offices. Such facts are pretty significant clues that a burglary is afoot. Despite the foregoing, James points to facts which she claims should have caused police to question whether a burglary was actually occurring.

First, she points to "omissions of fact in the officers' reports." (Appellant's Br., p. 27.) It is not clear to Respondents what the alleged unidentified omissions in the reports are. In addition, it is not clear what any omissions in the reports that would have necessarily been prepared well after the call's conclusion would have to do with a decision by officers at the active crime scene as to the type of crime they were facing.

Next, James relies upon the affidavit of her expert, Dan Montgomery, to call into question the characterization of the incident as a burglary. Mr. Montgomery feels that Respondent officers should have questioned whether a burglary was actually occurring and investigated further into whether James worked in the building. Montgomery places great weight on the facts that James told Hendryx she was getting her keys, that she remained on scene despite

being seen by Hendryx, that she is female, that she took the time to drink a beer and manipulate dental instruments, and the cleaning lady said a female worked in the building. James relies on the foregoing facts to the exclusion of a totality of the circumstances analysis. *Marquez v. City of Phoenix,* 693 F.3d 1167, 1174-75 (9th Cir. 2012)(consider relevant factors to effect a totality of the circumstances analysis). As previously discussed above, there were several other facts to suggest that a burglary was actually occurring which James fails to include in her analysis. Montgomery's subsequent armchair quarterbacking would, as the lower court stated, be more appropriate to a probable cause analysis but, in any event is conclusory and unduly favorable to James. *Soremekun, supra,* 509 F.3d at 984 (conclusory, speculative testimony in affidavits is insufficient to raise genuine issues of fact and defeat summary judgment).

James also claims that further investigation by officers would have affected the severity of crime analysis (not just the probable cause argument) because the crime of breaking a window is significantly different than the crime of burglary. If James had simply broken a window then the crime at issue may be malicious injury to property, a misdemeanor assuming the window was valued at less than $1,000.00. *See* Idaho Code § 18-7001(1). However, it is undisputed that after James broke the window, she crawled through it to enter the building. That important fact points to burglary, a felony. *See* Idaho Code § 18-1401. As recognized by the District Court, James conceded below that burglary is a serious crime. (R. 000748; R. 000662.)

Finally, James attempts to distinguish cases relied upon by the District Court. With respect to *Reed v. Wallace*, No. 12-CV-1948(PJS/JSM), 2013 WL 6513346 (D. Minn. Dec. 12, 2013), James points out that *Reed* involved the burglary of a dwelling occupied by a woman at night rather than an empty commercial building. As noted above, James conceded below that burglary is a serious crime and she did so without distinguishing between the types of locations

where burglaries may occur. James also suggests a reasonable inference may be drawn that she never had a knife since one was never found and Hendryx did not see it. However, Officer Butler testified that he saw James holding a knife and other involved officers testified that they were advised James was seen holding a knife or edged instrument. On summary judgment, the Court may not make credibility determinations. *Anderson,* 477 U.S. at 255.

With respect to *Lowry v. San Diego*, No. 11-CV-946-MMA(WMC), 2013 WL 2396062 (S.D. Calif. May 31, 2013), James points out that the police in *Lowry* had extremely limited information whereas police in the present matter had much more information with which to call into question whether she was a burglar. This argument flies in the face of her primary argument on appeal, supported by the opinions of Dan Montgomery, that police should have a duty to further investigate the nature of an apparent crime prior to canine deployment.

As the foregoing demonstrates, there can be no genuine dispute as to the propriety of the characterization of the crime at issue as a burglary. Further, both James' concession below and applicable law support the District Court's conclusion that burglary is a serious crime. *See* Idaho Code §§ 18-1403 and 18-111; *Sykes v. United States,* 131 S. Ct. 2267, 2273 (2011)("Burglary is dangerous because it can end in confrontation leading to violence."); *Miller v. Clark County,* 340 F.3d 959, 964 (9th Cir. 2003)(felonies are by definition crimes deemed serious by the state).

E. The District Court Properly Determined that James Posed an Immediate Threat to Police.

James relies upon Dan Montgomery's affidavit as evidence in support of her assertion that she did not present an "immediate" threat to investigating officers. However, the content she relies upon is conclusory and, therefore, not sufficient to raise a genuine issue of fact and defeat summary judgment. *Soremekun, supra,* 509 F.3d at 984.

Next, James analyzed the factors relied upon by the District Court in support of its determination that it was objectively reasonable to conclude James posed an immediate threat. One such factor is that James was armed with a bladed tool. James attempts to defeat this factor by calling into question Officer Butler's credibility. However, as previously noted, on summary judgment the court may not make credibility determinations. *Anderson, supra,* 477 U.S. at 255. James also argues that even if she was holding a weapon, she was not threatening anyone with it. Of course, she did not know police were present when she was observable to them. When it came down to the point in time when officers would be attempting to seize James, the fact that she had a weapon at her disposal would obviously pose a threat to them. The District Court logically determined the immediacy of the threat is to be examined at the time the seizure is attempted (R. 000755 through 000756) not, as James would have you believe, at the outset of the investigation when Officer Butler saw James through the basement window (Appellant's Br., p. 42.)

James next argues that although intoxicated she was described as lethargic and totally out of it and, therefore, did not present a threat. Despite being described as lethargic by Hendryx, she managed to break a window, crawl through it and apparently conduct business in the dental lab while continuing to drink. Further, it has been recognized by the Ninth Circuit in another excessive force case that people under the influence of mood altering substances often act in an unpredictable, irrational manner and, regardless of their physical size, can inflict serious injuries when resisting an officer. *Luchtel v. Hagemann,* 623 F.3d 975, 982 (9th Cir. 2010).

James also questions the assumption that she was hiding in a dark, unfamiliar building based upon her failure to comply with multiple warnings to surrender or risk getting bit. She asserts it is disputed whether officers attempted to look into the lit dental lab for activity and that

the number and timing of warnings are disputed. Such assertions are immaterial and/or incorrect. Officer Butler looked into the basement and saw James for a brief period before she went out of view. Whether officers attempted to look in is immaterial to the force analysis. In addition, the number and timing of warnings cannot reasonably be disputed as they are captured on audio tape (with the exception of the PA announcement that officers testified was made and which James cannot dispute due to her lack of recall).

The next argument put forth by James is that officers were only tactically disadvantaged if they decided to enter the building. Of course, officers could avoid all risk if they decided not to do their jobs. The District Court points out that James conceded at oral argument below that officers did not have to wait James out. (R. 000756, fn.21.) Moreover, the Ninth Circuit has specifically recognized that the government has an undeniable, legitimate interest in apprehending criminal suspects, which is even stronger when, as here, the criminal is suspected of a felony. *Miller v. Clark County, supra,* 340 F.3d at 964.

James has analyzed each factor in a vacuum. Yet, as previously discussed herein, the appropriate method of analysis for this type of claim involves consideration of the totality of the circumstances. *Plumhoff v. Rickard,* 134 S. Ct. 2012, 2020 (2014). Each of the above factors, taken together, demonstrate the immediate threat posed by James when officers attempted to locate her in the building.

F. Whether the District Court Erred in Making the Factual Determination that James was Actively Resisting and Evading Arrest by Hiding.

James asserts that her failure to respond to repeated warnings from officers regarding the canine cannot be a basis to conclude she was actively resisting arrest. She argues this is so

because no warnings were issued before the decision to deploy a canine had been made. This theory has no legal or logical support.

An excessive force analysis logically takes place at the time force is to be applied. An officer's decision that a canine would be deployed, in and of itself, is obviously not a use of force. At that point there has been absolutely no intrusion on a Fourth Amendment interest. *See Ashcroft v. al-Kidd*, 131 S.Ct. 2074, 2080 (2011). Moreover, the decision could be rescinded at any time prior to actual deployment. Under James' theory, a cause of action could accrue based upon the decision or idea alone.

Further, the audio recording supports the conclusion that James was purposely attempting to evade detection. It evidences the repeated, loud warnings issued to James, followed by loud barking from the canine inside the building, none of which James acknowledged. Such warnings, issued in a closed building at night could lead to no other rational conclusion other than that James was in fact intentionally disregarding officer's warnings and commands to surrender. James' discussion of police policy concerning warnings has no bearing on this analysis.

G. The District Court Properly Found that Additional Factors Also Weighed in Defendants' Favor.

The District Court stated it was undisputed that officers gave several warnings to James, both prior to entering the building and throughout the building search. (R. 000760.) However, James states she never conceded that a PA announcement was made. Despite her lack of concession, multiple officers testified regarding the PA announcement. James claims either to not have heard it or to not recall it. As the District Court stated, that is immaterial to the analysis. *Lowry,* 2013 WL 2396062 at *6. Rather, what matters is whether officers actually issued the warnings. *Marquez v. City of Phoenix,* 693 F.3d 1167, 1175 (9th Cir. 2012). James cannot

genuinely dispute the issuance of a PA announcement. Even assuming *arguendo* that no PA announcement was made, the officer audio recordings establish the undisputable existence of multiple other warnings provided to James such that the PA announcement itself is immaterial. Accordingly, the District Court did not err in finding this factor weighs in Respondent's favor.

James states that the District Court incorrectly found that there were inadequate alternative levels of force available to officers. James' failure to provide factual or legal support for this assertion is glaring. She indicates the police should have instructed the canine to just bark at her rather than bite. James cites to no support for this alternative. In contrast, Officer Bonas testified to the inadequacy of mere barking and that the method used by BPD, the Handler Controlled method, is actually safer for both the dog and the officer. (R. 000278, Ls. 4-10; R. 000765.) Moreover, Respondents pointed out below that lesser alternatives such as verbal commands and police presence were employed but ineffective.

Next, James alleges Respondents failed to comply with police department policy that instructs before using a canine to search a building, officers should contact the building owner if possible and determine if there are tenants, obtain a layout of the building and evacuate tenants prior to the search. It is undisputed that Respondents established contact with building owner Dr. Carrick Brewster, that Dr. Brewster responded to the scene and spoke with Officer Barber prior to Ruwa's introduction into the building. It is further undisputed that Dr. Brewster told Officer Barber that no one should be in the building, especially if the person had to break a window to gain entry. James argues officers should have followed up with information from the cleaning lady. This policy specifically refers to the building owner, not the cleaning staff. Officers complied with BPD policy when they contacted Dr. Brewster as described. Further, James's assertions regarding tenant evacuation are unfounded as this investigation occurred on a Sunday

evening when the building was closed and, as Dr. Brewster advised, no one was supposed to be in his building. Accordingly, the District Court properly found this factor weighs in favor of Respondents.

The plaintiff's mental and emotional state is an additional factor for consideration in the totality of circumstances analysis. *Luchtel v. Hagemann*, 623 F.3d 975, 980 (9th Cir. 2010). James was obviously impaired by at least alcohol at all times relevant to this matter. Hendryx reported she was totally out of it and heavily under the influence of drugs or alcohol. Officer Butler observed James drinking a Steele Reserve malt liquor. Even approximately an hour after she was seized her blood alcohol content was over three times the legal limit for a driver. *Luchtel* recognized the potential for unpredictability and violence by a suspect under the influence. Despite the fact that James did not actually exhibit aggressive behavior towards officers, it cannot be denied that her mental state was significantly impaired by alcohol such that this factor also properly weighs in Respondents' favor.

H. Whether Plaintiff's § 1983 Claim Should be Dismissed on Grounds Reasonable Minds Could Determine that the Governmental Interest is Outweighed by the Level of Intrusion Against James's Rights.

James argues there are too many factual disputes for summary judgment to be appropriate. That is simply not the case. As discussed above, none of the factual disputes raised by James created a genuine issue of material fact worthy of withholding summary judgment. Moreover, the District Court correctly determined that while the degree of intrusion or injury was significant, each *Graham* factor, as well as the additional factors included in the totality of the circumstances analysis overwhelmingly weigh in Respondents' favor. (R. 000766.) Accordingly, Respondents are entitled to summary judgment on the excessive force claim.

James' next argument is that her *Monell* claim was erroneously dismissed. *Monell v. Dept. of Social Services,* 436 U.S. 658 (1978). She states whether or not her complaint raised a *Monell* claim was never at issue, that parties are not required to respond to issues which are not raised by the opposing party. However, why would Respondents argue a claim that was never asserted against them? It is clear from James' complaint that she did not include a *Monell* claim and the court should affirm it's dismissal on that basis. *See* Idaho Rule of Civil Procedure 8(a)(1); *Brown v. City of Pocatello,* 148 Idaho 802, 807 (2010)(A cause of action not raised in a party's pleadings may not be considered on summary judgment nor may it be considered for the first time on appeal); *Matter of Estate of Bagley,*117 Idaho 1091, 1093 (Ct. App. 1990)(appellate court can affirm lower court's decision on different legal theory). Alternatively, dismissal should be affirmed for the reason stated by the District Court that the appropriate resolution of James' § 1983 claim in Respondents' favor also disposes of any *Monell* claim. (R. 000766.)

James also asserts that the District Court erred in granting immunity to individual officers. A qualified immunity analysis consists of two parts: (1) whether the facts a plaintiff has alleged or shown make out a violation of a constitutional right; and (2) whether the right at issue was clearly established at the time of defendants' alleged misconduct. *Pearson v. Callahan,* 555 U.S. 223, 232, 129 S. Ct. 808, 815-16 (2009). The first prong is already addressed herein at the excessive force analysis. With respect to the second prong of the analysis, the District Court relied upon findings in *Chew v. Gates*, *Miller v. Clark County* and *Lowry v. City of San Diego* for its determination that as of December 2010, there was no clearly established law proscribing the use of police dogs under circumstances presented to Respondent officers. (R. 000770 through 000771.) James failed to provide any argument or legal support to the contrary. A party waives an issue on appeal when the party fails to provide authority supporting its argument. *Puckett v.*

Oak Fabco, Inc., 132 Idaho 816, 821 (1999). Accordingly, the finding of qualified immunity below must be affirmed.

I. State Law Claims

1. Respondents are entitled to immunity under Idaho Code § 25-2808.

James conceded at oral argument that if the use of the canine was constitutionally reasonable as it related to her excessive force claim, then the immunity provision of Idaho Code § 25-2808 bars her state law claims. (R. 000771 through 000772; Appellant's Br., p. 64.) Moreover, the District Court found there was simply no evidence that Ruwa was not used reasonably and carefully. *Id.* at p. 41. The absence of any genuine issue of material fact on an element of the nonmoving party's case has been shown and James has not come forward with sufficient evidence to create a genuine issue of fact on this issue. *Smith v. Meridian Joint School District No. 2,* 128 Idaho 714, 719 (1996). Accordingly, Respondents are entitled to immunity on the state law claims pursuant to Idaho Code § 25-2808.

2. State law claims of assault, battery, false arrest and wrongful imprisonment were properly dismissed.

The Idaho Tort Claims Act provides immunity to Respondents from liability for James' claims of assault, battery, false arrest and wrongful imprisonment unless malice or criminal intent can be shown. Idaho Code § 6-904. James concedes that the record does not support a conclusion of ill will. (Appellant's Br., p. 65.) Likewise, Respondents assert there is simply no evidence in the record to support a finding of criminal intent. As previously argued herein, there can be no genuine dispute that all material facts pointed to a burglary in process and that investigating officers followed the policies of their department with respect to utilization of a canine to search the building for the suspected burglar. Moreover, the duration of the bite itself, up to 36 seconds, evidences the lack of criminal intent in and of itself.

3. The District Court did not err in dismissing James' claim for intentional infliction of emotional distress.

A claim for intentional infliction of emotional distress requires, *inter alia*, extreme and outrageous conduct by Respondents. *Alderson v. Bonner,* 142 Idaho 733, 739 (Ct. App. 2006). In addition, the level of emotional distress must be so severe that no reasonable person would be expected to endure it. *Payne v. Wallace,* 136 Idaho 303, 306 (Ct. App. 2001). The record is simply devoid of any evidence to meet these elements and the District Court's conclusion in that regard should be affirmed. A moving party is entitled to summary judgment when the nonmoving party fails to make a showing sufficient to establish the existence of an element essential to that party's case on which that party will bear the burden of proof at trial. *Brown v. City of Pocatello,* 148 Idaho 802, 806 (2010).

4. The District Court did not err in dismissing James' claim for negligent failure to train, supervise and control.

James' final claim was properly dismissed on the grounds that the claim itself contemplates the existence of a compensable underlying tort, which is not present in this case. (R. 000776.) The District Court also concluded that substantial evidence was lacking that Respondents failed to properly train, supervise and control Ruwa. *Id.* Respondents submitted evidence of both Ruwa's and Officer Bonas' training and certification and of Ruwa's utilization in accordance with BPD policy. James submitted just the conclusory statements of Dan Montgomery. Accordingly, the District Court's conclusion as to this claim should be affirmed.

CONCLUSION

Based upon the above arguments, Respondents respectfully requests that this Court affirm the decision of the District Court as to all issues raised on appeal.

DATED this 24 day of September 2014.

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CERTIFICATE OF SERVICE

I hereby certify that I have on this 24 day of September 2014, served the foregoing document on all parties of counsel as follows:

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